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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 759

BANK OF AMERIAA, NATIONAL TRUST AND SAVINGS ASSOCIATION, CALIFORNIA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 2069–2082) is reported in 130 F. (2d) 624. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 157–188) are reported in 26 N. L. R. B. 198.[1]

[1] The opinion of the court below, in addition to enforcing the order of the Board which is reported in 26 N. L. R. B. 198, also enforced another order of the Board which is reported in 14 N. L. R. B. 207, separate petitions to enforce the respective Board orders having been consolidated in the

JURISDICTION

The decree of the circuit court of appeals (R. 2082–2085) was entered on September 14, 1942. A petition for rehearing filed by petitioner was denied on December 17, 1942 (R. 2087). The petition for a writ of certiorari was filed on February 23, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of the fourth largest bank in the United States affect commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Whether a national banking association is "the United States" and accordingly not an employer subject to the Act within the meaning of Section 2 (2).

3. Whether there is substantial evidence to support the Board's findings that petitioner restrained, coerced, and interfered with its employees in the exercise of their organizational rights and discriminatorily discharged 10 of its em-

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court below. Petitioner has, however, filed a separate petition for certiorari respecting each Board order, the petition in the instant case being limited to the order reported in 26 N. L. R. B. 198, and the petition in *Bank of America National Trust and Savings Association* v. *National Labor Relations Board*, No. 758, this Term, filed February 23, 1943, being limited to the order reported in 14 N. L. R. B. 207.

ployees in violation of Section 8 (1) and (3) of the Act.

4. A question urged by petitioner, but which we think is not properly presented, is whether the Board's order abridged petitioner's freedom of speech in violation of the First Amendment.

5. Whether the Board's refusal of subpoenas for the production of immaterial evidence or privileged documents constitutes a denial of due process.

6. Whether the court below erred in refusing leave to petitioner to adduce evidence in the instant case, heard some 18 months after No. 758 and before a different Trial Examiner, concerning a claimed denial of due process in No. 758 based upon an alleged improper relationship between the Trial Examiner and other Board agents.

STATUTE

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 23–25.

STATEMENT

After appropriate proceedings, the Board on August 6, 1940, issued its findings of fact, conclusions of law and order (R. 157–188). The Board's findings of fact with respect to petitioner's operations are based upon uncontradicted evidence. The facts as found by the Board and

shown by the evidence may be summarized as follows:[2]

1. Commerce

Petitioner is a national banking association organized under the laws of the United States, with its main office in San Francisco, California, 495 branches in 307 California communities, and a branch in London, England (R. 163; 373, Bd. Exhs. 2a, 2d, 4e, 5d). As of December 31, 1937, its total resources amounted to approximately $1,574,000,000. It is the ninth largest bank in the world and the fourth largest in the United States (R. 163; Bd. Exhs. 2a, 3g, 4c).

In 1937, petitioner made loans to corporations, partnerships and individuals amounting to more than 629 million dollars (R. 164; Bd. Exh. 5k). One half of petitioner's loan portfolio of 700 million dollars in July 1939 was composed of commercial loans, of which approximately 105 million dollars constituted consumer credit issued to finance the purchase of automobiles, household equipment, and similar consumer goods, and 250 million dollars were loans to corporations, partnerships and individuals in all lines of business including petroleum production and refining, food canning and processing, lumbering and logging, mining, clothing, transportation and the manufacture of transportation equipment, newspapers

[2] In the following statement the references preceding the semicolons are to Board findings and the succeeding references are to supporting evidence.

and publishing, and stock exchange brokerage (R. 164; 1293–1295, 421–427).

On December 31, 1937, petitioner had an outstanding liability of nearly 24 million dollars for letters of credit, acceptances and foreign bills, on which it was either acceptor, endorser or maker (R. 164; Bd. Exh. 5a, 5b). During 1937 petitioner executed acceptances of more than 34 million dollars and purchased acceptances of other banks payable in States other than California of more than 17 million dollars. During 1938 the comparable figures were 46 million and 6 million dollars, respectively (R. 164; 412–413). As of June 30, 1938, petitioner maintained deposits in New York, Chicago, and other cities and had cash items in process of collection, amounting to over 82 million dollars (R. 164–165; Bd. Exh. 5c). As of December 31, 1938, petitioner held deposits from banks outside the State of California in the amount of 30 million dollars (R. 165; 444).

In 1937 petitioner sent to out-of-State banks from its Los Angeles and San Francisco offices, notes, drafts, bills, and coupons for collection outside of California in the amount of 157 million dollars, of which at least half were drafts covering bill of lading shipments of commodities to points outside the State of California or to foreign countries (R. 165; 449, 512).[3] During 1937 peti-

[3] During 1938 petitioner collected checks approximating the amount of one and a quarter billion dollars, of which 415 million dollars' worth were received for collection from other banks (R. 448–449).

tioner made telegraphic transfers of money to points outside the State of California in the amount of more than 463 million dollars and received telegraphic transfers of money from banks outside the State of California in the sum of over 606 million dollars (R. 165; 1287). In the same year it purchased more than 96 million dollars worth of foreign exchange, and sold in excess of 12 million dollars worth of travellers' cheques[4] and letters of credit (R. 165; 467–468, 1287–1288).

Petitioner's branch in London, England, handles the accounts of many California companies which do business abroad and finances shipments of commodities between England and the United States (R. 165–166; 1288).

Upon the basis of the above facts the Board found that petitioner's unfair labor practices affected commerce within the meaning of the Act (R. 181, 185).

2. Unfair Labor Practices

The Board's findings of fact relating to the unfair labor practices and the evidence in support thereof may be summarized as follows:

Beginning in the spring of 1937, various unions launched among petitioner's employees competing membership campaigns which came to petitioner's

[4] Petitioner's travellers' cheques may be purchased in some 31 foreign countries and in many States of the United States (R. 165; Bd. Exh. 6).

notice (R. 165–168; 516–532, 555–559, 1571–1572, 1936, 1005). Confronted with these organizational efforts, petitioner expressed its hostility to unionism as well as its conviction that the Act was not applicable to it (R. 168; 571, 574, 577–578, 579, 1007, 1741).

During the course of the organizational campaign one of petitioner's officials asserted that the charging union should not have joined the Congress of Industrial Organizations and that it would not be successful because of the radical constituency of that organization (R. 169; 545–547). At about the same time, a group of petitioner's bookkeepers who had joined a union were urged by the head bookkeeper with whom they discussed the matter, to take up with Schacht, the chief clerk, the advisability of their remaining members (R. 169; 557–558, 590, 591–592, 1180, 1189, 1192, 1205, 1218, 1240, 1270–1271). Schacht, who was charged with the responsibility for recommending promotions (R. 170; 544, 1055–1056, 1255–1256, 1258), discouraged their adherence to a union on the ground that it would be incompatible with professional preferment (R. 169–170; 592–593). Shortly after Schacht's talk every one of the bookkeepers who had heard him [5] requested the head bookkeeper to prepare letters

[5] Thomson, R. 592; Arata, R. 1182; Breen, R. 1193–1194; Brugaletta, R. 1235–1236; Healy, R. 1186–1187; Malaspina, R. 1225–1226; O'Donnell, R. 1277–1278; Pozza, R. 1241–1242; R. 1182, 1236.

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of resignation for him (R. 170; 1186, 1188, 1190, 1243, 1244). Letters of resignation were accordingly prepared by the head bookkeeper, signed by 9 of the bookkeepers, out of the group of 15 which had originally joined the union, and mailed together to the Union (R. 170; 560–564, 594–595, 602–603, 1188, 1203–1204, 1238, 1240, 1243–1244). The Board found that by the statements of petitioner's supervisory personnel related above, viewed in the light of petitioner's other conduct to be summarized hereinafter, petitioner interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act (R. 170–171).

In August 1937, union organizers appeared at petitioner's garage and sought to enlist union memberships among the automotive messengers (R. 174; 769, 777).[6] Campana, the branch man-

[6] These included ten employees: Paul Kovacich, Arthur Slattery, William Slattery, Thomas R. Cochrane, Attilio Barbano, Edward McCarthy, John Marconi, William Nicholas, Mario Petrocchi, and Frank Ruggiero (R. 173; 1862–1878). These together with C. C. Kerins, the manager (R. 173; 758, 1483), Charles Gloeckner, his assistant (R. 173; 783, 825–826, 1599), and John Carrick, a temporary employee (R. 173; 841), constituted the entire personnel of petitioner's automotive messenger department in the San Francisco area (R. 173–174; 831). This department, transferred to petitioner's direct control in 1931, after a period during which the service was contracted for through Kerins (R. 174; 1602), was responsible for the transportation of checks, supplies, and mail between the branches and the mail office. In addition to nine city routes with one messenger regularly assigned to each, there were two out-of-town routes (R. 174; 831–832, 955, 1606).

ager, promptly appeared with Kerins, the manager of the department, and ordered the organizers off and observed that they were "troublemakers" (R. 175; 769, 1531–1532). When the organizers reappeared on about August 20, most of the messengers became union members (R. 175; 777–779, 787–788, 846–847, 866–868, 910, 928–929, 971, 979–981). On being questioned by Kerins, one of the messengers told him that they had all signed up (R. 175; 780).

On the morning of September 3, Campana informed the messengers that petitioner had abolished their department and then held separate interviews with three of them, Kovacich, Carrick, and Ruggiero (R. 175; 784, 787, 833–838, 847–848, 910–911, 930, 972–973, 1535). Each was asked whether he had signed anything or joined any organizations. Kovacich, who had applied for membership, told Campana that he had not done so (R. 175–176; 846, 848). Campana then told him not to lie because he had the names of all the union members and forthwith discharged him (*id.*). Carrick, who was the last of the messengers to be employed, had not applied for union membership, and so informed Campana (R. 175; 833–835, 837–839). Campana promised Carrick petitioner would use him on another job (*id*). Ruggiero at first denied having joined the union, but thereafter admitted it when Campana told him that he had better tell him the truth because he knew

the identity of all the union members (R. 176; 972–973).

That same day, petitioner substituted for its former automotive messenger system a new system whereby individual service contracts were entered into with bonded drivers (R. 176; 1028–1032, 1848–1858). Although the automotive messenger system had been in operation for 6 years, none of petitioner's officials charged with responsibility for operation of the department knew that a change was contemplated until it was made effective (R. 178–179; 1442, 1513–1514, 1569–1570, 1575–1576, 1833, 1929–1930). Petitioner offered no explanation for suddenness of its change. Petioner assigned one of the messengers, Gloeckner, who had not joined the union, to the job of driver under its new system, and awarded the remaining five jobs to persons employed in other departments (R. 176–177; 1028–1032, 1439, 1442, 1845–1858).

On September 7, petitioner discharged Ruggiero, Arthur Slattery, Cochrane, Barbano, McCarthy, Marconi, Nicholas and Petrocchi (R. 176; 788, 869, 923–924, 940, 1860–1878). Carrick was given a temporary job (R. 175; 833–835, 837–839). William Slattery, who was absent from work due to an accident, was discharged when he returned to work, upon the asserted ground that petitioner could not discriminate between employees of the abolished department, although both Carrick and Gloeckner, who had not joined the union, were re-

tained (R. 176; 955–958; *supra,* pp. 9–10). None of the discharged messengers was given an opportunity to qualify for another job, although five of them had continuous service records ranging from 8 to 2 years (R. 177–178; 758–761, 774–775, 1868, 1870, 1872, 1876, 1878).

The Board found that petitioner timed the change in the automotive messenger service and discharged the 10 automotive messengers in order to rid itself of a nucleus of union members and sympathizers, and thereby violated Section 8 (1) and (3) of the Act (R. 180–181, 186).[7]

3. Denial of Subpoenas for Material in the Board Files

During the hearing petitioner applied for and was denied a subpoena for the production of (1) written statements made by witnesses to members of the Board's staff which were not used in the hearing (R. 819–820, 842, 861–863, 880); (2) correspondence between petitioner and the Board's regional office relating primarily to negotiation and settlement efforts prior to the hearing; and (3) all other statements in the files of the regional office or the Board "in any way connected with" the case (R. 1307–1311, 1321). With respect to the last two groups of statements, petitioner's asserted "sole purpose in asking for these docu-

[7] The Board dismissed the complaint insofar as it alleged discrimination as to the tenure of two additional employees (R. 188).

ments" was to obtain evidence that "there has been a deliberate attempt to favor the C. I. O. over the A. F. of L."[8] (R. 1313).

The Board's order directed petitioner to cease and desist from its unfair labor practices, to reinstate the discharged employees with back pay, and to post appropriate notices (R. 185–188).

On April 1, 1941, the Board filed in the court below a petition for enforcement (R. 178–184) and on April 12, 1941, the court below ordered that No. 758 (9784 below) be consolidated for all purposes with the instant case. On September 14, 1942, the court below handed down its opinion and decree (R. 2069–2085) enforcing the Board's order.

ARGUMENT

1. Commerce

Petitioner's contention (Pet. 9, 20–25) that the Act may not be applied to its operations is without merit. The court below, upon a consideration of the facts, properly found petitioner's operations to fall within principles definitive of the jurisdictional scope of the Act as decided by this Court (R. 2072–2074). No other result is

[8] This charge was clarified by an offer of proof (R. 1320–1321) that in prior settlement negotiations the Board's Regional Attorney had rejected a proposed agreement providing for the posting of notices in petitioner's branches stating that petitioner would not discourage union membership but omitting the name of the charging union (a C. I. O. union).

possible and no conflict of decisions is raised by the court's holding.

The test of jurisdiction laid down in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, is satisfied in any case in which "stoppage of * * * operations by industrial strife" would result in substantial interruption to or interference with the free flow of interstate commerce (301 U. S., at 41). Where such interruption would occur, the Court pointed out, unfair labor practices on the part of employers, shown by long experience to be "prolific causes of strife," have a "close and intimate relation" to interstate commerce and are subject to federal regulation under this Act (301 U. S., at 42, 43).

The widespread and drastic effects upon interstate and foreign commerce which would ensue from a cessation or restriction of petitioner's operations are patent upon the record. Huge interstate and foreign shipments of finished goods covered by bills drawn for petitioner's acceptance would pile up on docks, in freight terminals, and in warehouses for want of funds petitioner provides, funds which make possible their ceaseless movement from producer, domestic or foreign, to consumer, domestic or foreign. Similar results would attend a cessation of each of petitioner's other credit activities. The inability of merchants and retail customers to obtain petitioner's credit would play colossal havoc with the shipment and

distribution of merchandise. Like effects would attend the inability of California enterprises to obtain the funds necessary to the normal production and shipment of their products, such as the vital packing and canning industries whose products are distributed throughout the markets of the nation and the world, the lumber industry, the expanding airplane industry, the shipping industry, petroleum extraction and refining, and the like. A comparable blight would follow from a cessation of the operations and mechanisms by which petitioner collects, and handles for collection, checks, notes, bills, and comparable instruments, instruments whose prompt payment is a prime prerequisite to the conduct of commerce. Over thirty years ago, in *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111, Mr. Justice Holmes observed that one of the "primary conditions of successful commerce * * * at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business."

The facts plainly show that petitioner's activities affect commerce sufficiently to bring them within the Act. Compare *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197; *Board of Trade* v. *Olsen,* 262 U. S. 1; *Stafford* v. *Wallace,* 258 U. S. 495; *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533; *Wickard* v. *Filburn,* No. 59, decided Nov. 9, 1942;

United States v. *General Motors Corp.*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, 314 U. S. 618.

Aside from the intimate and pervasive effect of petitioner's operations upon interstate and foreign commerce, petitioner is subject to Congressional regulation because it is directly engaged in interstate commerce. Not as an optional or casual matter, but as an indispensable and regular feature of its business, petitioner constantly and extensively uses the mails, the telegraph, and like instrumentalities of interstate and foreign commerce to transmit and receive checks, bills, drafts, notes, and money, which are the media of its business. To take a single example, in 1937 petitioner made telegraphic transfers of funds outside the state in the sum of more than 463 million dollars, while receiving such transfers from without the state in the sum of over 606 million dollars. (R. 165; 1287.)

It cannot be doubted that one who, as a regular, characteristic, and necessary aspect of his operations, makes such use of the instrumentalities of commerce is directly engaged in interstate commerce and as such subject to regulation by Congress. With respect to similar operations, the Court has declared the Act applicable. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 229–230; *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S.

419, 432–433; *United States* v. *Ferger*, 250 U. S. 199;[9] *Champion* v. *Ames*, 188 U. S. 321.[10]

2. The Exemption of "The United States"

Petitioner contends that because it is a national banking association it is not an employer within the meaning of the Act (Pet. 20–22). Section 2 (2) of the Act excludes from the definition of employer "the United States, or any State or political subdivision thereof."[11] Petitioner seeks

[9] In the *Ferger* case the Court held that bills of lading covering interstate shipments were instrumentalities of interstate commerce so that Congress had full power to regulate their use. The acceptances, bills, drafts, warehouse receipts, checks, and like instruments covering interstate and foreign shipments, which petitioner buys, sells, accepts, makes, and otherwise deals in, would likewise seem to be instrumentalities of interstate and foreign commerce.

[10] Other relevant decisions are *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 276; *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 107; *Federal Radio Comm.* v. *Nelson Bros. Co.*, 289 U. S. 266, 279; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9–10.

[11] An earler draft of the bill, introduced in 1934, which failed to be enacted, defined the term "employer" to exclude "the United States, or any State, municipal corporation, or other governmental instrumentality" (Sec. 3 (2), p. 3 of S. 2926, 73rd Cong., 2d sess. See S. Rep. No. 1184 of that session). The present Act does not contain the express exclusion of government instrumentalities. However, the issue of whether the language used is broad enough to exclude instrumentalities is not here presented. The court below expressly refrained from deciding that issue because it held that petitioner is neither the United States nor an instrumentality thereof (R. 835–836).

to bring itself within the exclusion by showing that it is organized under a federal statute and is under federal regulation (Pet. 21–23). But obviously this is not sufficient to convert a privately owned corporation into "the United States," within the meaning of the above exemption. The fact that petitioner, like thousands of other private banks, may have been created under federal laws designed to effectuate Congressional policy, does not confer governmental status upon it.[12] The contrary is not indicated by cases, stemming from *McCulloch* v. *Maryland,* 4 Wheat. 316, treating nationally chartered banks as Government instrumentalities for purposes of immunity from state control. As the court below declared (R. 836):

> It [petitioner] is a privately owned corporation, privately managed and operated in the interest of its stockholders. * * * The United States did not create it, but has merely enabled it to be created. True, national banks are subject to strict regulation and supervision, but so are a host of other private enterprises. It is true, also, that national banks may at times be called

[12] As this Court pointed out in *United States Shipping Board Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 425–426:

"* * * national banks * * *, in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest. * * *"

upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the private purpose of the individuals who organize them.

3. The Evidence

Petitioner's contention (Pet. 10, 20, 34–36) that the Board's findings that petitioner violated Section 8 (1) and (3) of the Act are not supported by substantial evidence presents no question of general importance. Further, the evidence summarized in the Statement (*supra*, pp. 6–11) affords full support for the challenged findings. Contrary to petitioner's contention (Pet. 10, 35–36), the First Amendment does not require the Board to disregard all verbal evidence of unfair labor practices. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, does not so hold.[13] See *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7).

[13] In this case, unlike the Board's finding with respect to the ambiguous bulletin involved in the *Virginia Electric & Power* case, the Board's conclusion was "based on the totality of the Company's activities during the period in question" (314 U. S. at 477), for not only were the statements made, as the court below noted (R. 2078), in an atmosphere "of unfriendliness to unions manifested in more authoritative quarters," but, as the Board found (R. 170–171) they acquired a coercive character, not in isolation but in connection with petitioner's subsequent illegal conduct.

4. Procedure

There is no merit to the contention that petitioner was denied a fair trial because it was refused a subpoena for the production from the Board's file of prior written statements of Board witnesses not used in the hearing [14] and of correspondence relating to prior settlement negotiations (*supra*, pp. 11–12). As the court below held (R. 2081):

> Respondent complains of the action of the Trial Examiner in refusing to require the production of certain written statements said to be in possession of the Board. It claims that in these respects there was a denial of due process. We are unable to agree. Respondent was given full opportunity to make its defense. The evidence in question does not appear to have been germane to the matter under inquiry, which was whether respondent was or was not guilty of the unfair labor practices charged against it.

The Board was plainly not required to produce evidence of this character. Absent a showing of

[14] The Trial Examiner's refusal to grant petitioner access to the Board's files to obtain such material was clearly not an abuse of discretion since a contrary ruling would jeopardize the policy, expressed in the statute, of preserving free access to the procedure provided for therein. Section 8 (4) of the Act; cf. *Goldman* v. *United States*, 316 U. S. 129, 132.

prejudice, the decision below was correct and no question worthy of review presented.[15]

Petitioner asserts here for the first time that it was denied due process because the Board applied to it Section 21 of Article II of its Rules and Regulations, which required petitioner's counsel but not Board's counsel to submit to the Trial Examiner application for subpoenas desired during the course of the hearing specifying the name of the witness and the nature of the facts to be proved (Pet. 30–31). Precisely the same objection to the Board's rules with respect to the issuance of subpoenas was made in this Court in *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, 83 (C. C. A. 9), certiorari denied 310 U. S. 632. The Board's practice in this regard was expressly approved by the Court of Appeals for the District of Columbia in *Bethlehem Steel Co.* v. *National Labor Relations Board,* 120 F. (2d) 641, 651, where the court stated, "Though the Board did not apply to its own attorneys its rule that applications for subponas must specify the na-

[15] Cf. *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 175; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 177 (C. C. A. 3), certiorari denied, 308 U. S. 605; *North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. (2d) 76, 83 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Air Associates*, 121 F. (2d) 586 (C. C. A. 2); *National Labor Relations Board* v. *Ford Motor Co.*, 114 F. (2d) 905, 909 (C. C. A. 6), certiorari denied, 312 U. S. 689.

ture of the fact to be proved, no unfairness to petitioners is shown to have resulted. The Board's supervisory power over its own agents enables it, irrespective of such a rule, to prevent obstructive tactics on their part." See also *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 80 (C. C. A. 3); *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 F. (2d) 633, 634 (C. C. A. 2); *National Labor Relations Board* v. *Dahlstrom Metallic Door Co.*, 112 F. (2d) 756 (C. C. A. 2); *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888, 889 (C. C. A. 5).

Petitioner claims that on this point the instant case conflicts with *Inland Steel Corp.* v. *National Labor Relations Board*, 109 F. (2d) 9 (C. C. A. 7). But a subsequent decision of the Seventh Circuit, *National Labor Relations Board* v. *Acme-Evans Co.*, 130 F. (2d) 477, 483, certiorari denied, March 1, 1943, No. 681, this Term, proves that the Seventh Circuit does not deem the mere application of the rule, absent a showing of prejudice, a denial of due process.

Petitioner's contention that the court below erred in refusing to receive evidence that the claimed denial of due process in No. 758 by reason of alleged misconduct of the Trial Examiner also constituted a denial of due process in the instant case is obviously untenable. As is shown in the Board's brief in opposition in No. 758, pp. 10–16, petitioner's claim there was utterly with-

out merit. In addition, this case was heard some 18 months later and before another Trial Examiner (R. 357 and compare R. 268 in No. 758).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct, and there is no conflict of decisions. Accordingly, no further review would seem to be required. If, however, the Court should regard the question of commerce as warranting the granting of the writ, the writ should be limited to that issue.

Respectfully submitted.

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